

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange Carriers)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

COMMENTS OF VOICESTREAM WIRELESS CORPORATION

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SUMMARY

VoiceStream submits these comments to make the following points:

1. The ILEC refusal to provision dedicated transport UNEs to CMRS carriers distorts competition in the market for local telecommunications services. CMRS carriers increasingly are competing with ILECs' own fixed landline services, yet ILECs maintain bottleneck control over essential facilities – the high capacity trunks CMRS carriers use to connect their cell sites to their mobile switching centers (“MSCs”). This bottleneck control gives ILECs both the incentive and ability to improve their own competitive position by increasing the costs of mobile service (*via* charging for facilities at rates well above economic cost) – and generating monopoly profits as well. Congress enacted the UNE statute precisely to prevent ILECs from misusing their bottleneck power to distort competition in their favor.

2. The ILEC refusal to provision dedicated transport UNEs to CMRS carriers is unlawful. Section 251(c)(3) of the Act imposes on ILECs the “duty to provide, to *any requesting telecommunications carrier* for the provision of *a telecommunications service*, non-discriminatory access to network elements on an unbundled basis.” CMRS providers are telecommunications carriers, and they would use dedicated transport UNEs in the provision of telecommunications services, including local services that compete with the ILECs' own local services. Thus, under the plain language of the 1996 Act, a CMRS carrier like VoiceStream is entitled to obtain access to UNEs to the same extent as landline CLECs. Therefore, the Commission must permit (a) the conversion of CMRS carriers' existing special access circuits to dedicated transport facilities at UNE rate pricing and (b) CMRS carriers to obtain dedicated transport facilities at UNE rate pricing going forward. Both existing and newly ordered dedicated transport facilities must be subject to enforceable UNE provisioning and maintenance performance standards.

3. There is no factual basis to relieve ILECs from providing dedicated transport UNEs to CMRS carriers in the future. ILECs enjoy an effective monopoly in the provision of transport facilities needed by CMRS carriers, as evidenced by the fact that 96 percent of VoiceStream's MSC-to-cell site circuits are provisioned by ILECs. This ILEC dominance is not due to the fact that ILECs provide a better or cheaper service offering than CLECs. This ILEC dominance is rather due to the fact that CMRS carriers generally have no alternative choice for high capacity facilities.

4. State commissions should not be permitted to remove UNEs used by CMRS carriers. Congress has specified that state regulators may “not substantially prevent implementation of” the UNE statute, and the Commission has already held that state removal of nationally established UNEs would “not be consistent with the goals of the 1996 Act.” Further, Congress directed the Commission to “establish a Federal regulatory framework to govern the offering of all commercial mobile services,” and it amended the Act specifically to “foster the growth and development of mobile services that by their nature operate without regard to state lines...” State-by-state removal of UNEs utilized by CMRS carriers would be incompatible with a “Federal regulatory framework” for CMRS.

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COMMENTS OF VOICESTREAM WIRELESS CORPORATION

VoiceStream Wireless Corporation (“VoiceStream”)¹ submits these comments in response to the *UNE Triennial Review NPRM*.² VoiceStream limits these comments to the subject of the refusal of incumbent local exchange carriers (“ILECs”) to provision dedicated transport unbundled network elements (“UNEs”) to providers of commercial mobile radio services (“CMRS”).

I. THE ILEC REFUSAL TO PROVISION UNES TO CMRS CARRIERS INHIBITS CMRS CARRIERS FROM COMPETING WITH THE ILECs’ OWN SERVICES

CMRS carriers remain dependent on ILECs for a critical component of their CMRS networks: the high capacity circuits connecting the mobile switching center (and subtending base

¹ VoiceStream, combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. VoiceStream and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both VoiceStream and Powertel are, however, operated together and are referred to in this request as “VoiceStream.”

station controllers) (“MSCs”) with subtending cell sites or base stations.³ VoiceStream and other CMRS providers have documented to the Commission how ILECs have consistently refused to provide dedicated transport UNEs to them, thereby forcing CMRS carriers to purchase the ILEC’s much more expensive special access facilities.⁴ This ILEC refusal is unlawful under the Communications Act, as VoiceStream demonstrates in Part II below. But this ILEC position also is distorting competition in the market for local telecommunications services — because, by needlessly increasing CMRS network costs, ILECs are able to help shield their own local exchange services from increased competition.

The Commission asks in its *UNE Triennial Review NPRM* whether “mobile telephones provide an alternative to incumbent facilities” and whether “intermodal providers [offer] competitive alternatives to the incumbent’s network.”⁵ The Commission has since answered these very questions in its *Universal Services NPRM*, stating:

[M]obile service is becoming a substitute for traditional wireline services such as payphones and second lines to the home, and there is a small but growing number

² See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Notice of Proposed Rulemaking*, FCC 01-361 (Dec. 20, 2001), summarized in 67 Fed. Reg. 1947 (Jan. 15, 2002) (“*UNE Triennial Review NPRM*”). See also *Comments Extension Order*, FCC 02-591 (March 11, 2002).

³ CMRS carriers also use ILEC facilities to exchange traffic with ILECs and other carriers and to connect MSCs with CMRS network elements other than base stations (e.g., other MSCs, centralized databases).

⁴ See, VoiceStream and AT&T Wireless *Petition for Declaratory Ruling*, CC Docket No. 96-98 (Filed Nov. 19, 2001) at 4-5 & n.8 & n.9. Omnipoint, which has since merged into VoiceStream, first asked Verizon to begin provisioning UNEs in February 2000. Verizon waited nine months before it even responded, when it advised VoiceStream that it would not provision UNEs to CMRS carriers. This and other CMRS requests are documented in the following *ex parte* submissions in Docket 96-98: VoiceStream, AT&T Wireless and US Cellular (April 12, 2000); VoiceStream and AT&T Wireless (April 13, 2001); VoiceStream (May 16, 2001); AT&T Wireless (June 26, 2001); VoiceStream and Nextel (July 27, 2001); VoiceStream (Nov. 5, 2001); AT&T Wireless (Nov. 5, 2001); VoiceStream Comments, Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport (“Joint RBOC Petition”) Docket No. 96-98 (June 11, 2001); VoiceStream and Nextel Reply Comments, Joint RBOC Petition, Docket No. 96-98 (June 25, 2001).

VoiceStream has separately filed comments recently documenting its long and unsatisfactory experience with ILEC special access provisioning performance in a separate Commission proceeding. See VoiceStream Comments (Jan. 22, 2002) and Reply Comments (Feb. 12, 2002) *Performance Measurements and Standards for Special Access Services*, CC Docket No. 01-321.

⁵ *UNE Triennial Review NPRM* at ¶¶ 27 and 28.

of customers who have substituted mobile wireless for their primary residential lines. In addition, many customers are using their mobile service rather than interexchange service to make long distance calls: according to one report, 16 percent of customers surveyed now make most of their long distance calls using mobile services.⁶

A Verizon vice president is reported to have stated last November that his company for the first time had seen a drop in the number of lines, which he attributed to technology substitution, or “intermodal competition.”⁷ Given the number of CLECs that have failed or are failing and, given that the remaining CLECs are focusing on the large enterprise market, Chairman Powell is eminently correct in observing that CMRS networks offer “real competitive choices” and represent the “best hope for residential consumers” for competition.⁸

The fact that ILECs and CMRS providers are increasingly competing directly with each other while ILECs maintain bottleneck control over an essential component in CMRS networks, gives ILECs the ability to distort competition in their favor. As the Commission has previously recognized:

LEC control of bottleneck local exchange facilities – upon which competing CMRS providers must rely – gives LECs the opportunity to engage in anticompetitive behavior.⁹

The Commission has noted that when ILECs possess bottleneck control over essential facilities used by a competitor, the ILECs will attempt to charge monopoly rents, thereby forcing CMRS carriers “either to raise their retail prices or accept a reduction in their profit margins,”

⁶ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Further Notice of Proposed Rulemaking*, FCC 02-43, at 6-7 ¶ 11 (Feb. 26, 2002).

⁷ COMMUNICATIONS DAILY, “Telecom Experts See Slow Economic Recovery” (Nov. 16, 2001).

⁸ See FCC Chairman Michael K. Powell, Digital Broadband Migration – Part II, Speech at FCC Press Conference, at 4 (Oct. 23, 2001).

⁹ *Safeguards for LEC Provision of CMRS*, 12 FCC Rcd 15668, 15689 ¶ 27 (1997).

which, in turn, adversely affects their ability to attract additional capital.¹⁰ Either way, “the LEC has a competitive advantage.”¹¹ The incumbent LEC improves its own competitive position by increasing its competitors' costs – *and* it profits handsomely as a result, by charging prices for bottleneck facilities at rates well above economic cost.¹² Therefore, the Commission must permit (a) the conversion of CMRS carriers' existing special access circuits to dedicated transport facilities at UNE rate pricing and (b) CMRS carriers to obtain dedicated transport facilities at UNE rate pricing going forward. Both existing and newly ordered dedicated transport facilities must be subject to enforceable UNE provisioning and maintenance performance standards. This change would be solely an ILEC record keeping conversion for CMRS carriers' existing dedicated transport facilities, and similar to the conversions performed for CLECs. This change must occur without allowing ILECs to demand that CMRS networks be reconfigured or that unneeded services or facilities be purchased and/or installed as a condition of receiving UNE treatment.

There are two factors that are inhibiting the ability of CMRS carriers to provide a meaningful alternative to an ILEC's fixed local services: cost-driven higher prices and quality of service. If CMRS carriers could obtain cost-based prices for the dedicated facilities they lease from ILECs (UNEs) rather than paying inflated prices that include monopoly margins (special access tariffs), CMRS carriers could lower their recurring operating costs. The cost savings could then be used to build additional cell sites, and to expand wireless service areas to improve service quality. Savings from access to UNE pricing also would expedite investment in CMRS carriers' deployment of advanced wireless telecommunications services. Thus, consumers will benefit

¹⁰ *Id.* at 15689 ¶ 30.

¹¹ *Id.* See also *Interconnection Between LECs and CMRS Providers*, 11 FCC Rcd 5020, 5026 ¶¶ 12-13 (1996).

¹² The fact that an ILEC charges its own CMRS affiliate the same monopoly rents is immaterial to the analysis above, because the ILEC revenue and the corresponding CMRS expense have no net impact at the corporate parent's level, as the Commission has previously recognized. See, e.g., *Interconnection Between LECs and CMRS Providers*, 11 FCC Rcd at 5026 para. 13; *Safeguards for LEC Provision of CMRS*, 12 FCC Rcd at 15489-90 para. 30.

from robust, cost-based CMRS-ILEC competition and CMRS carriers will gain revenue generating opportunities by competing for ILEC customers when the ILECs are compelled to provide facilities at UNE rates. The current situation has had a direct negative impact on the ability of CMRS carriers to compete with the ILECs' own services.¹³ With established UNE provisioning and maintenance performance standards, CMRS-ILEC competition would be even more enhanced.

Congress mandated unbundled access to UNEs for all telecommunications carriers precisely to prevent ILECs from misusing their control over bottleneck facilities to distort competition in their favor – and to profit from engaging in such anti-competitive conduct. If, as the Chairman has observed, CMRS offers the “best hope for residential consumers” for competition, it is imperative that the Commission address this CMRS UNE issue expeditiously. It is time for CMRS to be able to compete head on with the ILEC's own local exchange services without being hobbled by paying artificially inflated prices for bottleneck ILEC facilities.

II. THE ILEC REFUSAL TO PROVISION DEDICATED TRANSPORT UNEs TO CMRS CARRIERS IS UNLAWFUL

CMRS carriers have a right under the Telecommunications Act of 1996 (“1996 Act”) to order dedicated transport UNEs from ILECs, as demonstrated in subpart A below. The excuses the ILECs have given for refusing to provision these UNEs are baseless, as demonstrated in subpart B. The Commission should, therefore, direct ILECs to provision immediately the UNEs

¹³ See, VoiceStream Comments, Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport (“Joint RBOC Petition”) Docket No. 96-98 (June 11, 2001) at 15-16 (discussing VoiceStream impairment from lack of UNE access not due merely to cost considerations but due to performance considerations as well.) “Of utmost importance is the fact that ILEC performance under special access tariffs is not influenced by statutory obligations or state regulations governing unbundled access to network elements, or compliance with the Section 271 competitive checklist.” *Id.* at 16. Accordingly, CMRS carriers lack important safeguards such as performance intervals, liquidated damages and other ILEC incentives, and enforcement remedies for non-performance, poor performance, delay, including the ability to participate in Section 271 proceedings to address BOC compliance with the Section 271 “competitive checklist.” See also, VoiceStream

CMRS carriers seek, and to convert the rates for existing special access facilities into dedicated transport UNEs.¹⁴

A. CMRS Carriers Have a Right Under the Act to Order Dedicated Transport UNEs from ILECs

Section 251(c)(3) unambiguously imposes on ILECs the “duty to provide, *to any requesting telecommunications carrier* for the provision of *a telecommunications service*, non-discriminatory access to network elements on an unbundled basis.”¹⁵ A CMRS carrier unquestionably is a “telecommunications carrier” within the scope of this 1996 Act.¹⁶ A CMRS carrier would also use dedicated high capacity UNE circuits in the provision of “a telecommunications service,” including local services that compete with the ILECs’ own local services.¹⁷ Thus, under the plain language of the 1996 Act, a CMRS carrier is entitled to obtain access to UNEs to the same extent as landline CLECs. For example, the Commission has already expressly recognized, that CMRS carriers are eligible to obtain from ILECs access to call-related databases as UNEs.¹⁸

The Commission has, moreover, squarely ruled that dedicated high capacity transport facilities are network elements within the scope of Section 251(c)(3),¹⁹ and that ILECs must provision such facilities under the “necessary and impair” standard. In particular, the Commission has

Comments (Jan. 22, 2002), *In the Matter of Performance Measurements and Standards for Special Access Services, et al.*, CC Docket No. 01-321, at 5-6.

¹⁴ It is crucial that the Commission recognize that special access circuits, now obtained through special access tariffs, are physically identical to dedicated transport circuits that would be obtained on a UNE basis.

¹⁵ 47 U.S.C. § 251(c)(3) (emphasis added). *See also UNE Remand Order*, 15 FCC Rcd 3696, 3737 ¶ 81 (1999) (ILECs have an “affirmative duty” to provide UNEs to “any requesting carrier”).

¹⁶ *See, e.g., First Local Competition Order*, 11 FCC Rcd 15499, 15989 ¶ 993 (1996). The Supreme Court recently confirmed that CMRS providers are “telecommunications carriers” under the 1996 Act. *See NCTA v. Gulf Power*, 122 S. Ct. 782, 789 (2002).

¹⁷ *See, e.g., First Local Competition Order*, 11 FCC Rcd at 15989 ¶ 993 and 15998-99 ¶ 1012.

¹⁸ *See Second E911 Reconsideration Order*, 14 FCC Rcd 20850, 20889-90 ¶¶ 100-101 (1999).

¹⁹ *See First Local Competition Order*, 11 FCC Rcd at 15717-22 ¶¶ 439-51.

“conclude[d] that lack of access to unbundled interoffice transport impairs a carrier’s ability to provide the services it seeks to offer”:

Requiring carriers to self-provision, or acquire from third-party providers, extensive interoffice transmission facilities materially increases the costs of market entry or of expanding service, delays broad-based entry, and limits the scope and quality of the competitor’s service offerings. Neither self-provisioning interoffice transport facilities nor obtaining these facilities from third-party sources is an adequate alternative to the ubiquitous transmission facilities that a competitor can obtain from the incumbent LEC under Section 251’s unbundling obligations.²⁰

This impairment analysis applies even more forcefully to CMRS carriers. Unlike CLECs, they are not in the business of constructing landline circuits and have a need for dedicated landline circuits over a very broad geographic area, a much broader area than CLECs cover, or ever will cover.

It is therefore not surprising that the ILECs have never argued that CMRS carriers are not entitled under the 1996 Act to obtain dedicated transport UNEs from them. Yet, without exception, ILECs have refused to provision these UNEs for VoiceStream and other CMRS carriers.

B. ILEC Excuses for Not Provisioning Dedicated Transport UNEs to CMRS Carriers Are Baseless

ILECs have offered a litany of excuses for refusing to provision dedicated transport UNEs to CMRS carriers. None of these reasons has merit, as demonstrated below.

It bears mention that, at bottom, the ILECs’ argument is that *they* possess the right to decide whether they may discriminate among requesting carriers (*e.g.*, treat CMRS carriers differently than CLECs) – even though the 1996 Act expressly prohibits ILECs from engaging in any discrimination in the provision of UNEs.²¹ ILECs maintain their position even though the Commission has squarely held that ILECs may “not discriminate against parties based upon the

²⁰ *UNE Remand Order*, 15 FCC Rcd 3696, 3846 ¶ 332 (1999).

²¹ *See* 47 U.S.C. § 251(c)(3).

identity of the carrier (*i.e.*, whether the carrier is a CMRS provider, a CAP, or a competitive LEC”:²²

We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise.²³

To give substance to this technology-neutral policy determination, which appears stronger than ever given recent Commission pronouncements embracing “intermodal competition,” the Commission must adopt rules expressly requiring access to dedicated transport UNEs for CMRS carriers without restriction.

1. CMRS providers are eligible for dedicated UNE transport between their cell sites and MSCs. Some (but not all) ILECs attempt to justify their refusal to provision dedicated transport UNEs on the ground that Commission rules supposedly permit use of transport UNEs only between “switches,” and in their view, a CMRS cell site base station is not a switch.²⁴ Rule 51.319(d)(1) provides that “[i]nteroffice transmission facility network elements include :

Dedicated transport, defined as incumbent LEC transmission facilities . . . dedicated to a particular . . . carrier, that provides telecommunications *between wire centers* owned by incumbent LECs or requesting telecommunications carriers, or *between switches* owned by incumbent LECs or requesting telecommunications carriers.²⁵

In other words, these ILECs unilaterally claim that they can avoid their statutory obligations simply because the Commission drafted its rules using traditional landline terminology, rather

²² *First Local Competition Order*, 11 FCC Rcd at 15612 ¶ 218.

²³ *Id.* at 15989 ¶ 993.

²⁴ *See, e.g.*, SBC Ex Parte, Docket No. 96-98 (July 10, 2001); Verizon Ex Parte, Docket No. 96-98 (Aug. 22, 2001). *See also UNE Triennial Review NPRM* at n.141.

²⁵ 47 C.F.R. § 51.319(d)(1)(i) (emphasis added).

than using more technology-neutral language.²⁶ To the extent that ILECs are allowed to find comfort in a rigid interpretation of definition under existing Commission rules prepared for wire-line competition alone, it becomes critical that the Commission's rules be amended to be technology-neutral so as not to permit ILEC discrimination against intermodal competitors such as CMRS providers.

VoiceStream views as crucially important the Commission's request for comment in this rulemaking as to whether transport to CMRS base stations fit within its existing unbundled transport definition or "whether we should modify our definition of transport to include the unbundling of these facilities."²⁷ The Commission should adopt a new definition of dedicated transport facility network elements which requires unbundled transport elements to be provided between a CMRS carrier's cell site base stations, MSCs, ILEC wire centers or any other traffic aggregation point on a requesting CMRS (telecommunications) carrier's network.

It bears repeating that this ILEC definitional argument about existing Rule 51.319(d)(1) (which is both unilateral and literalistic) applies only to a subset of the dedicated transport UNEs that CMRS seek – specifically, the channel termination component between a base station and the ILEC wire center serving the base station. That ILEC definitional argument, however, cannot be applied at all to dedicated transport facilities between an MSC and an ILEC wire center, or between two ILEC serving wire centers – yet the ILECs making this argument, after initially agreeing to CMRS eligibility for transport UNEs between CMRS MSCs,²⁸ have brazenly refused to provision these transport UNEs as well.

²⁶ Rule 51.319 origin is the August 1996 *First Local Competition Order*.

²⁷ *UNE Triennial Review NPRM*, ¶61.

²⁸ See VoiceStream and AT&T Wireless Petition for Declaratory Ruling at 18-19, nn.39-40. For example, BellSouth agreed one year ago in principle to provide VoiceStream unbundled transport for circuits between VoiceStream's MSCs. BellSouth then abruptly reneged on this June 2001 agreement, without explanation.

Second, the ILEC argument assumes that dedicated transport UNEs are confined to those few situations explicitly specified in Rule 51.319(d)(1)(i). But the Commission's use in the rule of the word "includes" makes apparent that the circumstances described in this rule are illustrative only, and do not limit the circumstances under which ILECs must provision dedicated transport UNEs to requesting carriers. The Commission confirmed this point in its accompanying order, when it stated that "unbundled access to dedicated transmission facilities . . . *includes, at a minimum*, interoffice facilities between such end offices and serving wire centers (SWCs), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandems of the incumbent LEC, and the wire centers of incumbent LECs and requesting carriers."²⁹

Finally, the ILECs' hypertechnical argument that a base station is not a switch lacks merit, even assuming the Commission intended to limit an ILEC's statutory unbundling obligation to "switches." The Commission has previously rejected a similar ILEC argument, holding that even a paging terminal qualifies as a "switch,"³⁰ and the ILEC argument is of the same genre as the one the Supreme Court rejected only two months ago:

[T]he proposed distinction – between prototypical wire-based "associated equipment" and the wireless "associated equipment" which allegedly falls outside the rationale of the Act – finds no support in the text, and, based on our present understanding of the record before us, appears quite difficult to draw.³¹

A switch is defined as an "electrical or electronic device which opens or closes circuits, completes or breaks an electrical path, or selects paths or circuits."³² CMRS cell site base sta-

²⁹ *First Local Competition Order*, 15 FCC Rcd at 15718 ¶ 440 (emphasis added).

³⁰ *See TSR Wireless v. U S West*, 15 FCC Rcd 11166, 11179-81 ¶¶ 22-24 (1999)(finding the ILEC argument "unpersuasive"), *aff'd* *Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

³¹ *NCTA v. Gulf Power*, 122 S. Ct. 782, 790 (2002).

³² NEWTON'S TELECOM DICTIONARY (17th Ed., 2001). The Commission frequently refers to Newton's in its decisionmaking, including the definition of a switch. *See, e.g., N11 Codes Second Order*, 15 FCC Rcd 15188, 15198 n.53 (2000); *Hi-Tech Furnace v. Sprint*, 14 FCC Rcd 8040, 8047 n.48 (1999); *Mountain Communications v. Qwest*, DA 02-250 (Jan. 31, 2002); *ILEC Broadband Telecommunications Services*, Docket No. 01-337, FCC 01-360, n.51 (Dec. 20, 2001).

tions certainly perform these functions.³³ Indeed, CMRS base stations are far more sophisticated than the simple one-way termination function performed by paging terminals, which the Commission has already ruled constitute switches. Besides, Commission rules are equally clear that an ILEC must permit “a requesting telecommunications carrier to connect such interoffice facilities to equipment designated by the requesting telecommunication carrier,”³⁴ which certainly can include base station equipment. This ILEC “base station is not a switch” argument is without merit, and merely a hypertechnical argument designed to deny CMRS carriers meaningful access to dedicated transport UNEs.

2. The Services Provided by CMRS Carriers Have Already Been Subjected to the Commission’s Impairment Analysis. Some (but not all) ILECs attempt to justify their refusal to provision dedicated transport UNEs on the ground that the Commission supposedly has “never conducted an impairment analysis for CMRS carriers.”³⁵ True, the Commission’s impairment analysis in the *UNE Remand Order* regarding dedicated transport did not mention CMRS carriers by name – but then, the Commission also never stated that CMRS carriers are any less deserving of access to unbundled transport than any other class of telecommunications carriers.³⁶

In fact, the ILEC assertion -- the Commission has “never conducted an impairment analysis for CMRS carriers” -- is erroneous. The Commission has already held that the impair-

³³ Base stations complete an electrical path between the MSC and the mobile customer by extending the radio frequency channels necessary for communication from the CMRS network to the customer. They also select a path between the customer and the MSC by picking up the handset transmissions on an appropriate wireless channel for transport to the base station and between the base station and the MSC by placing the communications on an appropriate landline channel for transport to the MSC.

For a fuller discussion of the switching and end office functions of base stations, see VoiceStream and AT&T Wireless Petition for Declaratory Ruling at 19-23.

³⁴ 47 C.F.R. § 51.319(d)(2)(iii).

³⁵ SBC Ex Parte, Docket No. 96-98, at 2 (July 10, 2001). *See also* Verizon Ex Parte, Docket No. 96-98 (Aug. 22, 2001); Qwest Ex Parte, Docket No. 96-98 (Sept. 26, 2001).

ment analysis in the *UNE Remand Order* extends to CMRS carriers. In that *Order*, the Commission also conducted an impairment analysis of ILEC call-related database UNEs.³⁷ Although the Commission did not expressly reference CMRS carriers in this discussion, it subsequently confirmed that CMRS carriers are eligible to access ILEC call-related databases under the UNE rules.³⁸ By this ruling the Commission has confirmed that its impairment analysis applies to CMRS carriers – even though it did not expressly mention CMRS carriers by name in its analysis.

As noted above, CMRS carriers are more impaired than CLECs by an ILEC's refusal to provision dedicated transport UNEs. Unlike CLECs, CMRS carriers are not in the business of self-provisioning landline circuits (*e.g.*, obtain needed rights-of-way), and self-provisioning of such circuits would be prohibitively expensive given the relatively few circuits needed at each base station. In addition, unlike CLECs, which tend to provide their services in limited geographic areas, CMRS carriers have tens of thousands of base stations that are dispersed throughout a wide geographic area, including deep penetration into suburban and rural areas otherwise underserved by competitive local services. ILECs know that CMRS is a nationally ubiquitous substitute to their services; hence, they seek to keep CMRS costs artificially high.

3. Special Access Services Are Not a Cost-Effective Alternative for Dedicated Transport UNEs. Some (but not all) ILECs advance a related impairment argument: CMRS carriers are not impaired by the ILEC refusal to providing dedicated transport UNEs because CMRS carriers can

³⁶ See *UNE Remand Order*, 15 FCC Rcd at 3842-51 ¶¶ 321-46; see also, *NCTA v. Gulf Power*, 122 S. Ct. 782, 790 (2002)

³⁷ See *UNE Remand Order*, 15 FCC Rcd at 3874-83 ¶¶ 400-20.

³⁸ See *Second E911 Reconsideration Order*, 14 FCC Rcd 20850, 20889-90 ¶¶ 100-101 (1999). This conclusion is buttressed by the Commission's current inquiry – namely, whether it should undertake an impairment analysis on “a service-by-service or market-by-market basis.” *UNE Triennial Review NPRM* at ¶ 36. This inquiry would have been unnecessary had the Commission already applied such an inquiry.

instead purchase more expensive ILEC special access services.³⁹ To the contrary, CMRS is indeed impaired in its ability to offer service without access to dedicated transport UNEs. The Commission has twice considered this ILEC argument, and rejected it. The Commission held:

If we were to adopt the incumbents' approach, the incumbents could effectively avoid all of the 1996 Act's unbundling and pricing requirements by offering tariffed services that, according to the incumbents, would qualify as alternatives to unbundled network elements. This would effectively eliminate the [UNE] option for requesting carriers, which would be inconsistent with Congress' intent to make available to requesting carriers three different competitive strategies, including access to unbundled network elements.⁴⁰

In refusing to offer UNE rates for dedicated transport to CMRS carriers, the ILECs never explain why they should be able to dismantle the interconnection regime that Congress established simply by filing tariffs with higher prices.

4. ILECs Intentionally Misconstrue the Supplemental Order Clarification (Safe Harbor Rule) to Deny CMRS Providers Access to UNE Rates for Dedicated Transport. Some ILECs take the position that, even if CMRS carriers are eligible to obtain dedicated transport UNEs for their base station connections, CMRS carriers may not convert existing special access circuits into UNEs because CMRS carriers do not satisfy any of the three "safe harbors" contained in the *Supplemental Order Clarification* ("SOC").⁴¹ This is a rather bizarre argument. According to these ILECs, the Commission, in an order designed to "extend" the availability of UNEs to inter-exchange carriers ("IXCs"),⁴² further intended to *restrict* the availability of UNEs to CMRS car-

³⁹ See, e.g., Verizon Ex Parte, Docket No. 96-98, at 3 (Aug. 22, 2001); Qwest Ex Parte, Docket No. 96-98, at 3 (Sept. 26, 2001). See also *UNE Triennial Review NPRM* at ¶ 44.

⁴⁰ *UNE Remand Order*, 15 FCC Rcd at 3855 ¶ 354. See also *First Local Competition Order*, 11 FCC Rcd at 15644 ¶ 287.

⁴¹ See, e.g., SBC Ex Parte, Docket No. 96-98, at 2 (July 10, 2001); Verizon Ex Parte, Docket No. 96-98, at 4 (Aug. 22, 2001).

⁴² See *SOC*, 15 FCC Rcd 9587 ¶ 1 (2000).

riers – even though the *SOC* does not even mention CMRS providers, nor does the *SOC* even consider how CMRS carriers would use UNEs and which ones CMRS providers would require.

The *SOC* has no applicability to CMRS carriers. CMRS carriers seek UNE rates for stand alone dedicated transport only, not loop/transport combinations (or enhanced extended links) discussed in the *SOC*.⁴³ The Commission specifically ruled in the *SOC* that the question of access to stand alone UNEs was not at issue.⁴⁴ In addition, the question the Commission addressed in the *SOC* was defining “the minimal amount of local service an IXC must provide in order to convert special access services to combinations of unbundled loop and dedicated transport network elements.”⁴⁵ CMRS carriers, however, are first and foremost, providers of local telecommunications service.⁴⁶ As a result, the three safe harbors that the Commission established for IXCs make no sense as applied to CMRS carriers – just as the Commission ruled that they make no sense applied to CLECs providing local telecommunications services.⁴⁷

* * *

The ILEC arguments discussed above should be seen for what they really are: flimsy excuses that ILECs have made to enable them to buy time, because, in taking this position, they can force CMRS carriers to invoke the lengthy regulatory process in order to obtain needed relief from flawed definitional interpretations. As they continue their unlawful practices, this ILEC

⁴³ See VoiceStream and AT&T Wireless Petition for Declaratory Ruling at 9-10 for a discussion of the *SOC*. With respect to CMRS use of dedicated transport, CMRS carriers have no need for landline loops because they use their licensed spectrum for the “last mile” connection to their mobile customers. See Petition for Declaratory Ruling at 7-8, 14-18.

⁴⁴ See *SOC*, 15 FCC Rcd at 9592 n.31 (The constraint on IXC conversion of special access services “does not apply to stand-alone loops.”).

⁴⁵ *SOC*, 15 FCC Rcd at 9591 ¶ 6. See also *id.* at 9592 ¶ 8 (“IXCs may not substitute an incumbent LEC’s unbundled loop-transport combinations for special access unless they provide a significant amount of local exchange service.”).

⁴⁶ See, e.g., *First Local Competition Order*, 11 FCC Rcd at 15999 ¶ 1013.

⁴⁷ See *Supplemental Order*, 15 FCC Rcd 1760, 1762 ¶ 5 (1999).

intransigence enables them to maintain collection of their monopoly rents, as well as to distort competition artificially in the local services market to the ILECs' advantage. The Commission should, therefore, expeditiously enter a declaratory ruling ordering ILECs to provision, finally, the UNEs that VoiceStream and other CMRS carriers have long sought.

III. THERE IS NO FACTUAL BASIS TO RELIEVE ILECS FROM PROVIDING DEDICATED TRANSPORT UNEs TO CMRS CARRIERS IN THE FUTURE

The Commission seeks comment on “whether, in light of changed circumstances, we should retain these [dedicated transport] unbundling requirements.”⁴⁸ There are no changed circumstances, at least as applied to CMRS carriers and, accordingly, there is no factual basis for the Commission to remove the ILEC obligation to provide dedicated transport UNEs to CMRS providers.

Ninety six percent (96%) of the circuits VoiceStream uses to connect its MSCs and cell site base stations are provisioned by ILECs.⁴⁹ VoiceStream's heavy reliance on ILEC facilities is not due to the fact that ILECs provide a better service offering than CLECs; it recently documented to the Commission the dismal performance of the nation's largest ILEC.⁵⁰ Nor is VoiceStream's heavy reliance on ILEC facilities due to ILECs providing a less expensive service offering than CLECs – they do not. Indeed, studies have documented that in areas where ILECs have won pricing flexibility for their special access service (supposedly due to CLEC competition), ILECs have instead increased their prices – confirming that the dedicated transport market is not competitive.⁵¹

⁴⁸ *UNE Triennial Review NPRM* at ¶ 61.

⁴⁹ Joint Petition Comments at 17 n.35.

⁵⁰ See VoiceStream Comments, Docket No. 01-321, at 6-11 (Jan. 22, 2002).

⁵¹ See, e.g., Comments of Ad Hoc Users Committee, Docket No. 01-321, at 2-3 and Appendix 1 (Jan. 22, 2002).

VoiceStream relies so heavily on ILEC facilities for one reason: about 96 percent of the time, it has no other choice.⁵² In most areas where VoiceStream needs circuits, the ILEC is generally the only game in town. Although the *NPRM* notes the inroads that some CLECs have made, the fact remains that CLECs generally limit their operations and facilities to highly populated city centers or high-tech corridors. CLECs generally do not serve suburban and rural areas. Yet, 78 percent of the interoffice circuits that VoiceStream leases are destined for suburban and rural areas, because mobile customers demand ubiquitous coverage.⁵³ For all practical purposes, ILECs maintain monopoly power in most areas of the country – the very areas where CMRS carriers need circuits for their networks.

VoiceStream wants competitive choices, and perhaps such choices will be available three years from now when the Commission conducts its third UNE triennial review. Presently, however, ILECs still possess monopoly power in the vast majority of locations served by CMRS carriers.

The Commission seeks comment on whether the special construction provisions of special access tariffs, such as non-recurring charges and term guarantees with termination liabilities, protect the ILEC from uncompensated UNE conversions.⁵⁴ VoiceStream urges the Commission to recognize that having already recouped their construction costs through their special access tariffs, there is no need for ILECs to further amortize and recover those costs over an extended period. VoiceStream does not want to win the right to UNE conversion of its special access circuits only to have to then pay special construction charges. For CMRS carriers, that would constitute paying a second time. The fact that special construction charges have been assessed and

⁵² In response to the Commission's questions, CMRS carriers generally have no alternative to ILEC facilities, much less "less burdensome options." See *UNE Triennial Review NPRM* at ¶ 61.

⁵³ Joint Petition Comments at 17 n.35.

recouped by an ILEC for special access facilities, in no way, should diminish the right of CMRS carriers to convert their special access circuits to UNE rate pricing, *i.e.*, cost-based rates for monthly recurring charges for dedicated transport facilities.

IV. STATE COMMISSIONS SHOULD NOT BE PERMITTED TO REMOVE UNEs USED BY CMRS CARRIERS

The Commission has sought comment on “the extent to which state commissions can act in creating [or] removing” UNEs.⁵⁵ Section 251(d)(3) authorizes state regulators to add UNEs to the national list,⁵⁶ and the Commission has held that states can “remove network elements *added by the states*.”⁵⁷ The Act, however, is equally clear that states cannot remove UNEs that the Commission has determined meet the “necessary and impair” standard. For states to act in this area, the state action must “not substantially prevent implementation of the requirements of this section and the purposes of this part.”⁵⁸ A state commission attempt to remove a UNE that the Commission has determined is necessary to promote competition would, by definition, be inconsistent with the requirements of the Act. As the Commission previously held on this very subject, state removal of nationally established UNEs would “not be consistent with the goals of the 1996 Act”:

[W]e have found that unbundling particular network elements is necessary to further the goals of the Act. Consequently, at this time, state decisions to remove these network elements from the national unbundling obligations would “substantially prevent implementation of the requirements of section 251,” as prohibited by subsection 251(d)(3)(C).⁵⁹

⁵⁴ *UNE Triennial Review NPRM* at para. 63.

⁵⁵ *UNE Triennial Review NPRM* at ¶ 75.

⁵⁶ *See* 47 U.S.C. § 251(d)(3).

⁵⁷ *UNE Remand Order*, 15 FCC Rcd 3696, 3768 ¶ 156 (1999)(emphasis in original).

⁵⁸ 47 U.S.C. § 251(d)(3)(C).

⁵⁹ *UNE Remand Order*, 15 FCC Rcd at 3768 ¶ 157.

The Commission should not, moreover, permit states to remove UNEs utilized by CMRS carriers, even assuming that there may be circumstances where states may otherwise relieve incumbent LECs from providing nationally established UNEs. Congress has directed the Commission to “establish a Federal regulatory framework to govern the offering of all commercial mobile services.”⁶⁰ It modified Sections 2(b) and 332(c) specifically to “foster the growth and development of mobile services that by their nature operate without regard to state lines,” and because Congress considers “the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.”⁶¹ State-by-state removal of UNEs utilized by CMRS carriers would be incompatible with the federal regulatory framework that the Commission is charged with establishing for CMRS carriers.

⁶⁰ H.R. REP. NO. 103-213, 103d Cong., 1st Sess. 490 (1993).

V. CONCLUSION

For the foregoing reasons, VoiceStream respectfully requests that the Commission promptly order incumbent LECs to convert and provision immediately, at UNE rates and subject to UNE performance standards, the dedicated transport elements that CMRS carriers are now using and will seek in the future.

Respectfully submitted,

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⁶¹ H.R. REP. NO. 103-111, 103d Cong., 1st Sess. 260-61 (1993).